

BEFORE THE SUBCOMMITTEE ON WATER AND POWER RESOURCES

COMMITTEE ON RESOURCES

U.S. HOUSE OF REPRESENTATIVES

Testimony on Behalf of the City of Pueblo, Colorado,

Concerning Proposed H.R. 3881

Pueblo Reservoir Reoperation / Enlargement

Michael A. Occhiato, President, Pueblo City Council

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MARCH 19, 2002

BEFORE THE SUBCOMMITTEE ON WATER AND POWER RESOURCES
TESTIMONY ON BEHALF OF THE CITY OF PUEBLO, COLORADO,

Michael A. Occhiato, President, Pueblo City Council
Anne J. Castle, Esq., Holland & Hart LLP, Special Water Counsel*
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H.R. 3881 would authorize the Secretary of Interior to enter into contracts that would effectively increase the capacity of Pueblo Reservoir available for the storage of non-federal water rights by a substantial amount, and also authorize feasibility and other studies relating to the proposed physical enlargement of Pueblo Dam and Reservoir. As discussed in more detail below, the City of Pueblo, Colorado opposes H.R. 3881, as currently proposed, because the legislation would result in substantial, additional depletion of the already severely impacted Arkansas River as it flows through Pueblo.

I. TESTIMONY OF MICHAEL A. OCCHIATO

Pueblo is a community of approximately 105,000 people located on the semi-arid plain in southeastern Colorado, and serves as the medical, financial, retail and cultural center for 350,000 people from the Continental Divide east to Kansas, and from the City of Fountain south to the New Mexico border. Located at the confluence of the Arkansas River and Fountain Creek (*see* the location map attached at Tab B), Pueblo has been an important trading and population center for over 300 years. Spanish and French explorers visited in the sixteenth century and Zebulon Pike explored the area in 1806 when it became part of the United States. The present day city of Pueblo was incorporated in 1886 as a consolidation of three previously existing towns. From the 1870s until after completion of the Moffat Tunnel in 1928, which allowed the diversion of rail traffic across the continental divide at a more northern location, Pueblo was a thriving industrial and railroad city, second in population only to Denver. The Arkansas River has always been an important part of the City, due both to its prominent role in commerce and industry and as a source of water for the community. The River may have divided the City geographically, but it has also united the people of our community both as a devastating force of nature such as occurred in the 1921 flood, and as the peaceful riparian habitat enhancing the urban core of the City adjacent to our City parks, river trails and nature center.

We have very serious, continuing concerns regarding the impact that passage of H.R. 3881 will have upon our community. Before addressing the flaws in this bill, a brief history of the original Fryingpan-Arkansas Project, of which Pueblo Reservoir is an integral part, may be helpful.

* Disclosure information and the qualifications of Ms. Castle are attached at Tab A.

During the early 1930s, Pueblo and the Arkansas Valley experienced a severe drought, which created near dustbowl conditions. This continued for many years, preventing otherwise fertile soil from being productive throughout the normal growing season. In the mid-1950s, President Dwight D. Eisenhower visited Pueblo and the Arkansas Valley. He took this opportunity to experience firsthand the blighted conditions of the soil and the plight of the region's farming communities. In good, wet years, nature stored heavy-packed snow in the high Rocky Mountains. Farmers had water for the initial part of the growing season, but not all of the growing season, as run-off in the early part of the season prevented water from being available later in the year. This flow regime made it difficult for the farming community to harvest good crops and utilize the fertile soil to its full potential. After many years of local citizens selling cast iron frying pans to generate funds for lobbying Congress, President John F. Kennedy visited Pueblo and signed legislation authorizing the Bureau of Reclamation to begin building the Fryingpan-Arkansas Project, part of which is Pueblo Reservoir located less than 10 miles upstream from Pueblo. This project brings surplus water from the western slope of Colorado to southeastern Colorado for use by the people of southeastern Colorado. Once completed in 1975, Pueblo Reservoir provided relief to the farm communities downstream as a more reliable source of precious water for both agriculture and domestic use.

Now, nearly thirty years later, there are those that see the project's usefulness not in terms of preserving the River and the life which it brings to southeastern Colorado, but as a vehicle to transfer and store additional water for use elsewhere. Both the economic difficulties of farming and the value of water to thirsty metropolitan cities - such as Aurora which lies more than 100 miles north of Pueblo - are exerting pressure to remold the project into a vehicle to transfer more water away from Pueblo and the region generally, by making possible additional upstream exchanges of water, that previously flowed through the City to downstream users. As explained below by Ms. Castle in her testimony, H.R. 3881 as presently drafted, will allow further exchanges and transfers, and conceivably could at times dry up the Arkansas River through Pueblo.

As presently written, Pueblo must oppose H.R. 3881. First, we do this because the bill authorizes reoperation of the project and contemplates enlargement of water storage space in a manner that will benefit other entities far from the Arkansas River while burdening Pueblo. These burdens are the additional depletion of the Arkansas River as it flows through Pueblo, thereby diminishing the value of the River as an important and irreplaceable amenity for the City and its residents. Second, the project may thwart the City's efforts to restore the riparian habitat and enhance recreation through Pueblo under the Arkansas River Corridor Legacy Project (the "Legacy Project") being undertaken by the United States Army Corps of Engineers in partnership with Pueblo. The Legacy Project, which involves improvements to approximately ten miles of the River as it runs through the core of the City, has been long in planning, and enjoys the support and cooperation of numerous entities, including the Pueblo Natural Resources and Environmental Education Council, funding from Great Outdoors Colorado and the provision of lands and easements from the Pueblo Conservancy District. Third, the River may be depleted to such a degree that

costly improvement to the City's wastewater treatment facilities will be required, even though the improvements will not result in corresponding environmental or health benefits. A reasonable quantity of water must be present in the River to allow fish and other aquatic life to thrive, before an advanced level of wastewater treatment becomes the limiting factor.

Pueblo would be able to support this legislation if it provided enforceable mechanisms to protect minimum flows of 100 cubic feet per second ("cfs") through Pueblo during the winter months (November 15 through March 15), and 500 cfs in the summer release months (March 16 through November 14). Without this protection, depletions to the River through the City can only increase with the reoperation and enlargement of Pueblo Reservoir, and the "voluntary" minimum flow level that is currently specified in the bill as a desirable "target" flow is unenforceable and insufficient.

We acknowledge that an enlarged Pueblo Reservoir would also somewhat enhance the existing reservoir as a recreational amenity. Notwithstanding this, we believe that the harm which would come from the present bill far outweighs its benefits to Pueblo. We also feel it is important to ensure that sufficient quality water is available to our neighboring communities downstream.

Pueblo remains committed to pursuing an appropriate, cooperative resolution of the issues that will allow for increased water storage opportunities in Pueblo Reservoir to improve water supply reliability, while protecting the interest of Pueblo and its residents in preserving appropriate minimum flow levels in the Arkansas River through Pueblo. We sincerely ask for this Subcommittee's cooperation in either amending the bill to resolve our concerns or to delay the measure for a reasonable time to allow the affected state interests to develop an appropriate solution.

II. TESTIMONY OF ANNE J. CASTLE

The reoperation and physical enlargement of the storage capacity in Pueblo Reservoir that is the subject of H.R. 3881, has been proposed and developed by the Southeastern Colorado Water Conservancy District (the "Southeastern District"), and a group of some of its constituents dominated by municipal water providers, including the cities of Colorado Springs and Aurora (respectively located more than 40 and 100 miles from Pueblo Reservoir and the Arkansas River). These entities will reap the greatest benefits of the increased water storage capacity, while the lion's share of the negative impacts of the project will be borne by Pueblo. Pueblo's concerns and fears that H.R. 3881 and the proposed reservoir reoperation and enlargement project will materially harm Arkansas River flows and Pueblo's interests are confirmed by the studies and reports prepared for the Southeastern District and referenced in the bill. *See, e.g.*, "Preferred Storage Options Plan Report," Sept. 21, 2000 (the "PSOP Report"), p. 31 (stating "[r]e-operation storage will facilitate additional river exchanges that could impact stream flows below Pueblo Dam," and confirming that flows from a reoperated Pueblo Reservoir as low as 49 cfs will occur).

Pueblo has been engaged for many months in discussions with the Southeastern District and the municipal water providers supporting the project, in an attempt to reach a mutually acceptable resolution of Pueblo's concerns. Pueblo has advocated, unsuccessfully thus far, for the development of enforceable limitations on uses of the increased storage capacity in Pueblo Reservoir that could further diminish outflows from the Reservoir below minimum acceptable levels. It is unreasonable and inequitable for the entities that will be able to significantly increase the value and yield of their water rights through the proposed reoperation and enlargement, to insist that they be allowed to do so to the maximum extent possible, without some reasonable level of mitigation to the impacted Arkansas River environment through Pueblo.

Pueblo has also been actively participating in the Water Court processes initiated by the Southeastern District, Aurora, and others relating to water rights issues associated with the reoperation and enlargement of Pueblo Reservoir. Pueblo, too, is pursuing its own claim for a junior water right for recreational flows in the Arkansas River. Colorado's Water Courts, however, do not provide a ready forum or adequate remedy for the injuries that will be caused by the significant additional depletion of flows that will occur as a direct result of H.R. 3881 and the proposed project.

A. Arkansas River Flows through Pueblo Already Diminished. Since construction of Pueblo Reservoir, the flow regime of the Arkansas River as it runs into and through Pueblo has been increasingly the subject of management and manipulation to satisfy the needs of the agricultural and municipal interests that rely on water from the River. One significant impact is a very substantial reduction in flows in the River from mid-November to mid-March each year. During this period, the Southeastern District operates its "winter storage program," and the outlet on Pueblo Reservoir is virtually shut down. Attached at Tab C are two recent photographs depicting the Arkansas River with winter flows (measured at approximately 70 cfs on the day of the photos) through downtown Pueblo. Flows in the River increase during the spring and summer months when releases of water called for by downstream irrigators are made.

The existence of Pueblo Reservoir just upstream of the City diminishes flows in the Arkansas River through Pueblo by allowing for the upstream "exchange" of water into the Reservoir of water that has traditionally flowed through the City to satisfy downstream water rights. Under these exchanges, which are the subject of Water Court decrees, water is stored in Pueblo Reservoir, rather than being taken out of the River at original points of diversion downstream, thereby reducing the flow of the River through Pueblo. Such decreed exchanges are currently being operated by the Cities of Colorado Springs and Aurora, among others.

B. H.R. 3881 Will Further Reduce Flows. The authorization of H.R. 3881 for reoperation of the east slope facilities of the Fryingpan-Arkansas Project (Sec. 3 of the proposed bill) will take effect immediately to facilitate additional exchanges of downstream water rights to storage and conveyance facilities upstream of Pueblo. This reoperation is sought because the authority of the Bureau of Reclamation to enter into contracts for the storage of "non-project" water in Fryingpan-Arkansas Project facilities has been challenged. In addition, the PSOP Report, specifically incorporated in the

proposed bill, expands the definition of “excess water storage capacity,” thereby effectively creating a larger federally subsidized storage reservoir for private use.

As acknowledged in the PSOP Report, the proposal to expand the storage capacity of Pueblo Reservoir has the potential to result in further dewatering of the river as it flows through Pueblo, by providing additional storage capacity into which water can be exchanged upstream. The current ability of several municipalities to operate their decreed exchanges is limited by the availability of upstream storage, and an enlarged Pueblo Reservoir will allow more water to be exchanged. A new water supply pipeline for the delivery of additional water from Pueblo Reservoir north to Colorado Springs and neighboring communities is currently in the planning stages.

The bottom line is that upstream exchanges of Arkansas River water rights that cannot be operated currently due to the limited availability of storage in Pueblo Reservoir, would be able to operate if the Pueblo Reservoir reoperation and enlargement sought in H.R. 3881 proceeds. The result will be further reduction in Arkansas River flows through Pueblo, as the exchanged water is transferred out of, rather than flowing from Pueblo Reservoir.

C. Negative Impacts to the Legacy Project, Including Fish, Wildlife, and Recreation. The Legacy Project being undertaken at an estimated cost of \$6.6 million, as a partnership between the Corps of Engineers and Pueblo, is intended to rehabilitate fish and wildlife habitat and improve public recreational opportunities in a 10-mile reach of the Arkansas River, stretching from Pueblo Dam downstream through the City. The anticipated benefits to Pueblo and the riverine environment that will result from the Legacy Project, which is scheduled to be completed in 2004, will evaporate if Arkansas River flows substantially diminish below current levels. Pueblo believes that a wintertime flow of 100 cfs through the City is the minimum level that would be sufficiently protective of the improved wildlife habitat, re-established fish populations, and recreational aspects of the Legacy Project. **The “voluntary,” “target” flow of 100 cfs at the outfall of the Dam, provided for in H.R. 3881 and supporting documents is not an adequate guarantee or protection of the investment in the Legacy Project.**

The significant negative impacts to fish and wildlife, and recreational opportunities on the Arkansas River through Pueblo that could result from H.R. 3881 would also be contrary to the original purposes of the Fryingpan-Arkansas Project, which include “supplying water for irrigation, municipal, . . . and for other useful and beneficial purposes incidental thereto, *including recreation and the conservation and development of fish and wildlife . . .*” Pub. L. No. 87-590, 76 Stat. 389 (1962) (emphasis added.) The interests of the municipal water providers that are supporting the Pueblo Reservoir reoperation and enlargement should not be advanced, to the exclusion and at the expense of the other intended purposes of the original project.

D. The Proposed Project Will Diminish Water Quality. Passage of H.R. 3881 will exacerbate the poor water quality conditions that exist at certain times in the Arkansas River. The reoperation and proposed enlargement will not only result in decreased quantity of water through Pueblo, but also will allow distant municipalities to

take high quality upstream water out of the system, and substitute treated sewage effluent or lower quality downstream water by exchange. The relatively high levels of selenium carried into the Arkansas River by Fountain Creek is a widely-recognized water quality issue of increasing concern to the regulatory community. Further flow reductions in the Arkansas River obviously will reduce the dilutive capacity of the River, making the impacts of the poor quality from Fountain Creek even more acute.

Additionally, further flow reductions in the Arkansas River will pose potentially significant compliance problems for Pueblo's municipal wastewater treatment plant (the "Treatment Plant"), by reducing the amount of dilution flow that is available to mix with treated effluent discharged from the plant. If this occurs, Pueblo may be required to implement costly additional treatment processes in order to comply with future discharge permitting requirements of the United States Environmental Protection Agency and the Colorado Department of Public Health and Environment. These issues are compounded by the fact that the discharge point for Pueblo's Treatment Plant is located immediately downstream from the confluence of the Arkansas River and the already poor quality flows from Fountain Creek.

E. Conclusion/Proposed Solution. Pueblo is not conceptually opposed to reoperation or enlargement of the Fryingpan-Arkansas facilities, including Pueblo Reservoir. However, these changes that benefit entities far away from the facilities must be balanced with a recognition of the great potential for detrimental impact on the City located in the midst of those facilities. Pueblo's proposed amendments to H.R. 3881 would simply protect a minimum flow of water through the City and prevent new exchanges from drying up the River entirely. The minimum flows sought to be protected (100 cfs during the winter, and 500 cfs during the remainder of the year) are less than the average flows that exist currently in this section of the River (see the graph attached at Tab D.)

Pueblo remains hopeful that an appropriate, cooperative resolution of the issues can be achieved that will allow for increased water storage opportunities in Pueblo Reservoir to improve water supply reliability for the municipal water providers, while protecting the interests of Pueblo and its residents in preserving appropriate minimum flow levels in the Arkansas River through Pueblo. Again, Pueblo recognizes that as with all similar projects, a balancing of the potential water supply benefits of the proposed reoperation and enlargement project, against the resulting negative impacts must occur; however, the balance proposed by the Southeastern District and others as proposed in H.R. 3881 is vastly unfair to Pueblo and its residents.

TAB A

DISCLOSURE REQUIREMENT
Required by House Rule XI, clause 2(g)
and Rules of the Committee on Resources

A. This part is to be completed by all witnesses:

1. Name: Anne J. Castle
2. Business Address: Holland & Hart LLP, 555 17th Street, Suite 3200, Denver, CO 80202
3. Business Phone Number: 303-295-8000
4. Organization you are representing: City of Pueblo, Colorado
5. Any training or educational certificates, diplomas or degrees or other educational experiences which add to your qualifications to testify on or knowledge of the subject matter of the hearing:

See attached

6. Any professional licenses, certifications, or affiliations held which are relevant to your qualifications to testify on or knowledge of the subject matter of the hearing:

See attached

7. Any employment, occupation, ownership in a firm or business, or work-related experiences which relate to your qualifications to testify on or knowledge of the subject matter of the hearing:

See attached

8. Any offices, elected positions, or representational capacity held in the organization on whose behalf you are testifying:

See attached

B. To be completed by nongovernmental witnesses only:

1. Any federal grants or contracts (including subgrants or subcontracts) which you have received since October 1, 1999, from the U.S. Bureau of Reclamation* the source and the amount of each grant or contract: None

2. Any federal grants or contracts (including subgrants or subcontracts) which were received since October 1, 1999, from the U.S. Bureau of Reclamation* by the organization(s) which you represent at this hearing, including the source and amount of each grant or contract: None

3. Any other information you wish to convey which might aid the members of the Committee to better understand the context of your testimony:

Anne J. Castle is special water counsel to the City of Pueblo, Colorado.

*Note: When the witness letter is sent out, complete the blank to identify the federal agency or agencies overseeing the program or law which is the subject of the hearing.

HOLLAND & HART LLP

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Partner - Denver Office

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Water Rights
Water Quality

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Expertise

Ms. Castle is a practitioner in water rights and water quality law, and has over twenty years experience in water court litigation, including adjudications of water rights, changes of water rights, and plans for augmentation, and appeals. She represents clients in water rights and water quality administrative proceedings and in water rights conveyancing, contracts for purchase, use, and supply of water, and in the evaluation and assessment of water rights. She is experienced in the particular issues faced by water suppliers, both public and private. She has also worked extensively with special district issues, including both water and wastewater treatment districts. She has experience in water quality discharge permitting and wetlands regulation. She represents a wide variety of water users including municipal water and wastewater treatment providers, mining companies, ski areas, real estate developers, special water and sanitation districts, farmers and ranchers, lenders, and operators of industrial and commercial facilities.

Ms. Castle is currently the chair of Holland & Hart's Management Committee. She was formerly Chair of the firm's Natural Resources Department.

Publications

"Federal Land Management Laws and Their Impact on Water Development in the West"
"Prevention of Use of Contaminated Ground Water"
"The Nature and Extent of Property Rights in Water"

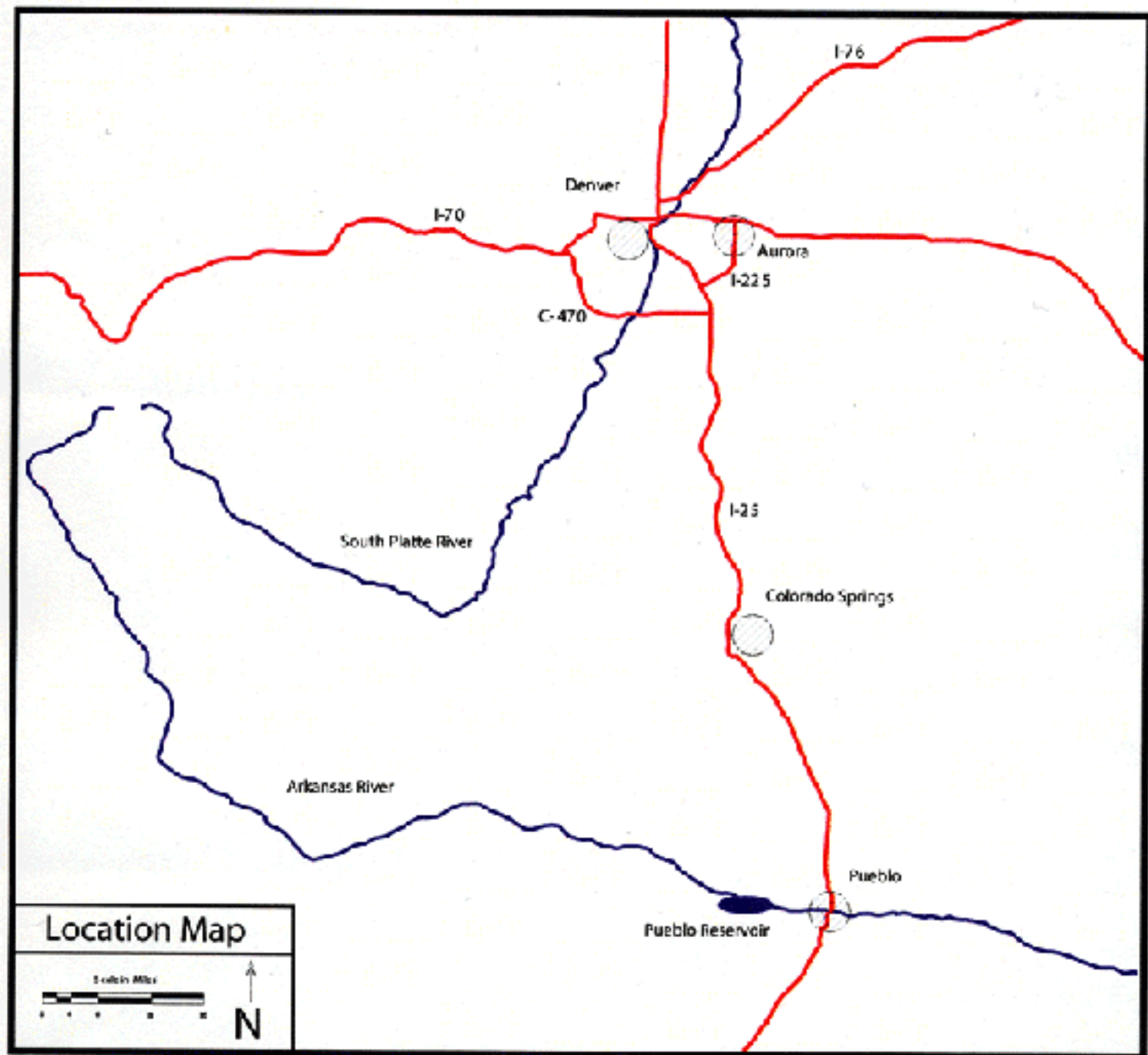
Professional Activities

Member, Colorado Ground Water Commission, appointed by Governor Romer (1994 to present)
Board of Directors, Colorado Legal Services (formerly, Legal Aid Society of Metropolitan Denver, chair (1991 to 1998), member of board (1983 to present)
Chair and elected member, board of directors, Genesee Water and Sanitation District (1989 to present)
Member, Colorado Supreme Court Committee on the Rules of Civil Procedure (1991 to 1998)
Board of Trustees, Rocky Mountain Mineral Law Foundation (1994-95), chair of special institutes on water issues: Ground Water Contamination (1987) and Wetlands Regulation (1994)
Board of Directors, Legal Aid Foundation of Colorado (1998 to present), Chair Elect 2002
Board of Directors, Public Education and Business Coalition (1998 to present)

Education

University of Colorado (J.D., 1981)
Order of the Coif
University of Colorado (B.S., Applied Mathematics, 1973)
With Honors, Boettcher Foundation Scholarship

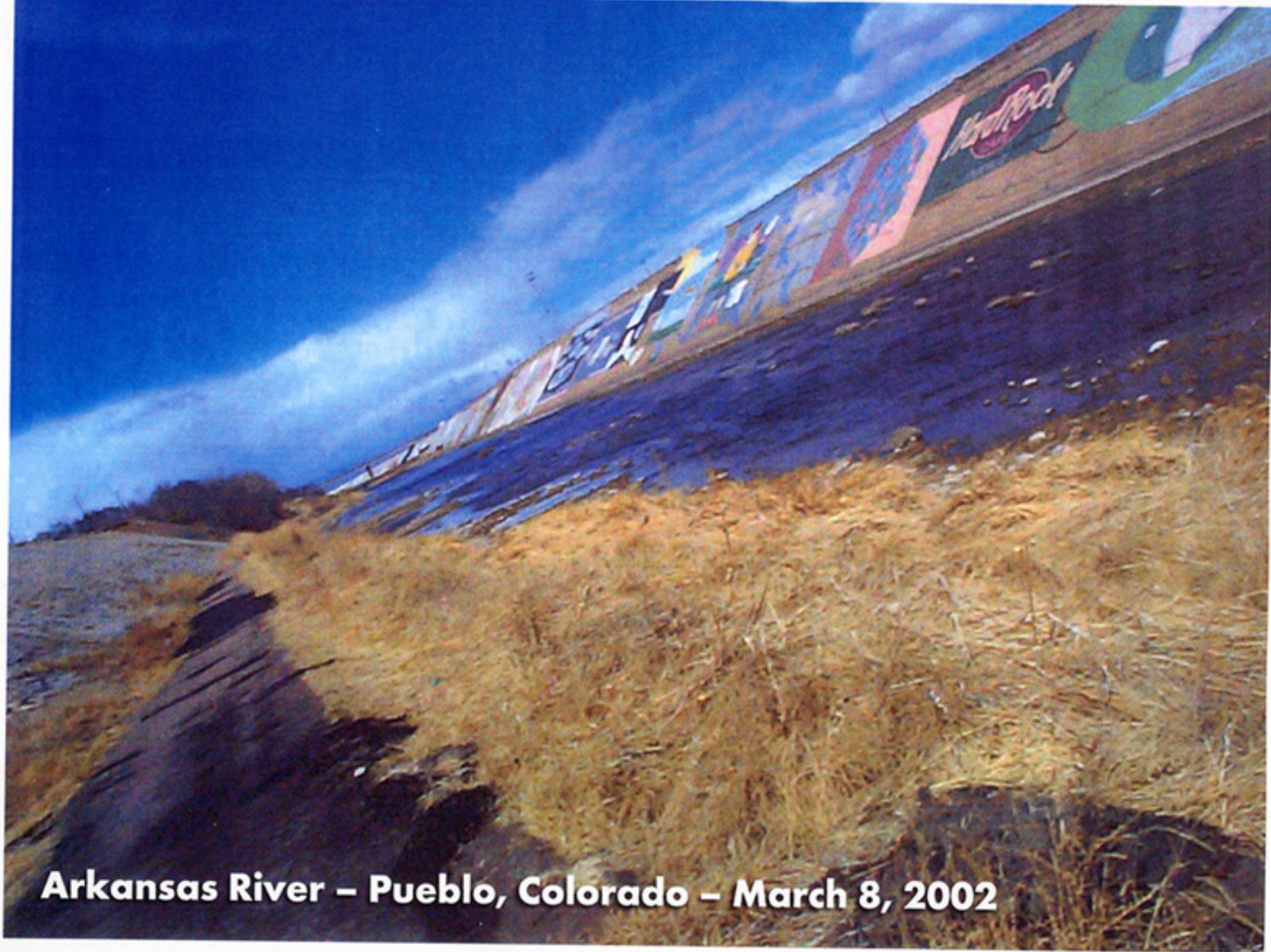
TAB B



TAB C



Arkansas River – Pueblo, Colorado – March 8, 2002



Arkansas River – Pueblo, Colorado – March 8, 2002

TAB D

**Arkansas River at the Moffat St. Gage
Average and Maximum Daily Flow Rates
1989-2000**

